FILE COPY

IN THE

Supreme Court of the United States

OCTOBER 1938 TERM

No. 94

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED,
Petitioner,

v.

TERRITORY OF HAWAII by Public Utilities Commission of the Territory of Hawaii, *Respondent.*

BRIEF ON BEHALF OF INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED.

GARNER ANTHONY,
Counsel for Petitioner.

ROBERTSON, CASTLE & ANTHONY,
Honolulu, Hawaii.
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C

SUBJECT INDEX.

TABLE OF CASES.

STATUTES.

INDEX TO APPENDIX.

CHRONOLOGY.

1913 July 1	The Utility Act (Act 89 S. L. Hawaii 1913, appendix p. 41) became effective.
1913 April 28	Section 17 of the act (appendix p. 47) providing for "reasonable costs and fees" was amended to provide for the collection of fixed fees of 1/10 of one per cent on gross receipts plus 1/20 of one per cent of the capital stock of each utility payable annually (appendix p. 45).
1913 April 29	Act 135 S. L. of Hawaii 1913 enacted (appendix p. 47) effective on approval of Congress; this act made utilities holding federally approved franchises subject to the Utility Act.
1916 March 28	Act of Congress (39 Stat. 38, c. 53; appendix p. 49) approving Act 135 S. L. Hawaii became effective.
1916 September 7	Shipping Act, 1916 (39 Stat. c. 451, 46 U. S. C. Sec. 801, appendix p. 51) became effective.
1917 December 7	Supreme Court of Hawaii held the Commission was without jurisdiction to regulate the rates, fares and practices of petitioner and that its proceedings in that respect were void. In Re Inter-Island, 24 Hawaii 136, 148.
1930 June 1	Commission filed action in this cause for fees claimed to be due. (R. 1)

IN THE

Supreme Court of the United States

OCTOBER 1938 TERM

No. 94

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED,
Petitioner,

v.

TERRITORY OF HAWAII by Public Utilities Commission of the Territory of Hawaii, *Respondent.*

BRIEF ON BEHALF OF INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED.

This cause is here on a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, which affirms the judgment of the Supreme Court of Hawaii filed January 21, 1937, affirming the judgment of the Circuit Court of the First Judi-

cial Circuit Territory of Hawaii (hereinafter called the trial court) in favor of respondent for the recovery of certain statutory fees asserted to be due from petitioner.

OPINIONS BELOW.

Opinion of the Circuit Court of Appeals, filed April 16, 1938:

96 F. (2d) 412. (R. 318)

Opinions of the Supreme Court of Hawaii:

32 Hawaii 127. (R. 42)
33 Hawaii 890. (R. 259)

Opinion of the trial court (unreported), filed April 12, 1934. (R. 45)

JURISDICTION.

The judgment of the Circuit Court of Appeals was filed on April 16, 1938. The petition for a writ of certiorari was filed in this Court on June 6, 1938 and granted on October 10, 1938. The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347).

The jurisdiction of the Circuit Court of Appeals for the Ninth Circuit is based on Section 128 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 225), which gives that court appellate jurisdiction to review final judgments of the Supreme Court of Hawaii in all cases wherein the Constitution or a statute of the United States is involved. This cause involves the Constitution of the United States, the Shipping Act of 1916 (39 Stat. c. 451; 46 U. S. C. Sec. 801, *et seq.*) and other federal statutes. The amount in controversy exceeds $5,000.

STATEMENT OF THE CASE.

This action was brought by the Public Utilities Commission of the Territory of Hawaii (hereafter called the Commission) to recover certain statutory fees claimed to be due from the petitioner for the years 1922-1930, inclusive, pursuant to Chapter 132,[1] Revised Laws of Hawaii 1925 (referred to herein as the "Utility Act").

Petitioner challenges the application of the Utility Act to it and also its validity as applied in this cause upon the ground that the fees, a substantial part of which are measured by a fixed percentage of its gross receipts from interstate and foreign commerce, are demanded for a purported inspection service which the Commission is without power to perform and which in fact during the nine years in question it has not performed; that the fees bear no reasonable relation to cost of inspection or supervision of petitioner and therefore impose an unconstitutional burden on interstate and foreign commerce, contrary to the commerce clause of the Constitution, are excessive under the due process clauses of the Fifth and Fourteenth Amendments; and that the Utility Act so far as it relates to petitioner has been superseded by the Shipping Act, 1916.

The relevant provisions of the Utility Act are:

Rev. L. Hawaii 1925, Section 2208

"The term 'public utility' as used in this chapter shall mean and include every person, company or corporation, who or which may * * * operate,

[1] The Utility Act was originally Act 89, Session Laws of Hawaii 1913, amended by Act 127 Session Laws of Hawaii 1913, and became Chapter 132 Revised Laws of Hawaii 1925, referred to herein as "Rev. L. Hawaii 1925"; this Chapter is summarized in Appendix, p. 41.

any plant or equipment, * * * for public use, for the transportation of passengers or freight, or the conveyance or transmission of telephone or telegraph messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air between points within the Territory, or for the production, conveyance, transmission, delivery or furnishing of light, power, heat, cold, water, gas or oil, or for the storage or warehousing of goods."

Rev. L. Hawaii 1925, Section 2193

"The commission * * * shall have power to examine into the condition of each public utility doing business in the Territory, the manner in which it is operated, with reference to the safety or accommodation of the public, the safety, working hours and wages of its employees, the fares and rates charged by it, the value of its physical property, the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relations with other persons, companies or corporations, its compliance with all applicable territorial and Federal laws and with the provisions of its franchise, charter and articles of association, if any, its classifications, rules, regulations, practices and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations. * * * "

Rev. L. Hawaii 1925, Section 2207

" * * * all costs and fees paid or collected hereunder shall be deposited in the treasury of the Territory to the credit of a special fund to be called the 'Public Utilities Commission Fund' which is created for the purpose. There shall also be paid to the commission in each of the months of March

and September in each year by each public utility which is subject to investigation by the commission a fee which shall be equal to one-twentieth of one per cent of the gross income from the public utility business carried on by such public utility in the Territory during the preceding year, plus one-fiftieth of one per cent of the par value of the stock issued by such public utility and outstanding on December 31 of the preceding year, if its principal business is that of performing public utility services in the Territory. Such fee shall likewise be deposited in the treasury to the credit of the fund. The moneys in the fund are appropriated for the payment of all salaries, wages, and expenses authorized or prescribed by this chapter."

The Shipping Act of 1916[2] vests complete regulatory powers over common carriers by water in the Shipping Board and by its terms was made specifically applicable to transportation on the high seas between the ports of the Territory and hence to petitioner.

"The term 'common carrier by water in interstate commerce' means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession." (39 Stat. c. 451, p. 728; 46 U. S. C. Sec. 801.)

Twenty years ago the Supreme Court of Hawaii decided that Congress by enactment of the Shipping Act,

[2] Shipping Act, 1916 became effective September 7, 1916, 39 Stat. c. 451, p. 728; 46 U. S. C. Sec. 801-842; it is summarized in Appendix, p. 51; the powers of the Shipping Board have been transferred to the Maritime Commission under the Merchant Marine Act, 1936 (49 Stat. 1985, 46 U. S. C. Sec. 1101-1246).

1916 had ousted the Commission of all regulatory jurisdiction over this same Company. Since that decision the Commission has never made or attempted any supervision or inspection of petitioner's business, leaving this task with federal agencies charged with performing it under the acts of Congress. *In Re: I. I. S. N. Co.*, 24 Haw. 136.

Apart from the Shipping Act, 1916 petitioner is subject to what this Court has called "a maze of regulation." The federal acts[2] relating to its operations are "extremely detailed." *Kelly* v. *Washington*, 302 U. S. 1, 4.

There exists no conflict in the evidence; the facts are set forth in the opinions of the courts below and may be summarized as follows:

The Commission in its complaint filed June 1, 1930 alleged that it was duly constituted under the Utility Act, that petitioner, a Hawaiian corporation, operated a number of steam vessels carrying passengers and goods as a common carrier on the high seas between ports of Hawaii, and that by virtue of the Utility Act it was obliged to pay to the Commission the fees prescribed by the act. (R. 1)

The complaint further alleged that prior to the year 1922 petitioner paid the statutory fees, but since September 26, 1922, refused to pay; that the computation of the fees for the years 1922 to 1930 based upon one-tenth of one per cent of its annual gross receipts and

---

[2] The following are the more important federal statutes applicable to petitioner's business: 46 U. S. C. c. 14, relating to inspection of steam vessels; 46 U. S. C. c. 15, relating to transportation of passengers and goods by steam vessels; 46 U. S. C. c. 24, Merchant Marine Act of 1920; 46 U. S. C. c. 12, regulating vessels in domestic commerce; it would unduly encumber this brief to refer to the regulations promulgated by the several federal agencies pursuant to this legislation.

one-twenty-fifth of one per cent of its outstanding capital stock amounted to $33,724.44, claimed to be due.

A demurrer was interposed to the complaint setting up that by virtue of the Shipping Act, 1916, which vested complete regulatory and supervisory powers over petitioner in the United States Shipping Board, the Commission was without power to require the payment of the fees demanded. (R. 7) This question was certified to the Supreme Court of Hawaii, which court held that although the Shipping Act, 1916 divested the Commission of all regulatory powers it did not prevent investigation by the Commission, and that "since the power to investigate exists, the power to defray the expenses of such investigation follows." (R. 26)

The cause was remanded to the trial court for hearing on the merits. The demurrer was overruled. Petitioner filed its answer (R. 29-30), which denied liability for the payment of the fees; denied the jurisdiction of the Commission over its business; alleged that it was engaged in part in the business of a common carrier by water in interstate and foreign commerce; that the fees demanded constitute an unreasonable burden on the interstate and foreign commerce; that the sum of $33,724.44 bore no relation to the cost of supervision and inspection, and that no inspection or supervision of it was ever made by the Commision; that the imposition of the fees demanded is repugnant to the Fifth and Fourteenth Amendments to the Constitution; and that the fees demanded under the Utility Act conflict with the Shipping Act, 1916.

The trial court found that 75 per cent of petitioner's annual gross freight receipts during the years in question ($10,321,559.; R. 74) was from the carriage of goods in a continuous journey in interstate and foreign

commerce (R. 55, 56); that during the period in question (1922 to 1930) no investigation of petitioner had been made by the Commision; that no services had been performed by the Commission on its account or for its benefit; that the only time spent by the Commission upon petitioner was three one-half hour examinations of its books for the purpose of ascertaining the fees claimed to be due. These facts were stipulated at the trial. (R. 41, 43, 47)

It is an undisputed fact that public utilities doing business in the Territory of Hawaii are divided into two groups,[4] group A being those utilities which are subject to exclusive federal supervision and control and group B, those utilities which are not subject to federal regulation and control but are under the exclusive jurisdiction of the local Commission (R. 69). Petitioner is in group A since it is subject to complete federal control and supervision. The vast majority of the work of the Commission was and is devoted to supervising and regulating those utilities subject to the exclusive jurisdiction of the Commission. The services performed by the Commission in respect to group A utilities are of a minor nature. (R. 113-115) Notwithstanding this fact, the statute purports to exact the same identical fee from utilities which are subject to exclusive federal regulation as it does from those utilities subject to regulation by the local Commission exclusively. The Commission's auditor testified that there was "very little relation" between the fees paid and the services performed. (R. 152)

[4] This classification is not contained in the Utility Act but exists as a matter of fact under existing federal legislation; the Utility Act makes no such classification but demands the same fees from utilities under complete federal supervision and control which are demanded from those utilities over which the Commission has exclusive regulatory power.

The trial court ruled that since petitioner was engaged in interstate and foreign commerce, the Territory, without the approval of Congress, had no power to exact from it the fees provided for by the Utility Act (R. 56); and that Congress, upon the approval of Act 135, Session Laws of Hawaii 1913,[5] validated what would otherwise be an unconstitutional burden on interstate and foreign commerce. A judgment for $53,435.55 (the fees with interest) was entered in favor of the Commission. (R. 66)

Petitioner appealed from this judgment to the Supreme Court of Hawaii. That court did not pass upon the ground upon which the trial court rested its decision; it affirmed the ruling that petitioner was engaged in interstate and foreign commerce.

> "The record discloses and it was found by the court below to be a fact that 75 per cent of the defendant's gross annual freight receipts was derived from freight carried by it in commerce with foreign nations and among the several States." (R. 264)

The Supreme Court of Hawaii also affirmed the finding of the trial court that the Commission had made no inspection and expended nothing in the supervision, inspection, or regulation of petitioner.

> "The trial court at the request of the defendant found, and we think correctly, 'that during the year 1922 to date "no services were ever performed by the public utilities commission in connection with the defendant utility, and that the only time spent by the public utilities commission on the business of this defendant was on three separate

[5] This act placed certain franchise-bearing corporations under the jurisdiction of the Utility Act, see Appendix, p. 49.

occasions of one-half hour each" in which the auditor of the Commission examined the defendant's books for the purpose of computing the fees to be due and that this service was only worth not to exceed $30.00 gross' and that 'only such service as indicated was in fact rendered directly as a service which could be characterized as "on behalf of the defendant." ' " (R, 277, 278)

The Supreme Court of Hawaii reaffirmed its previous ruling that the passage of the Shipping Act, 1916 did not deprive the Commission of the right to collect the fees notwithstanding it had no regulatory powers over petitioner; held that the burden of proving the fees unreasonable was upon petitioner and that it failed to sustain that burden; that the court was bound by the legislative determination of the reasonableness of the fees; and that they imposed no unconstitutional burden on interstate and foreign commerce, and were valid under the Fifth and Fourtetenth Amendments. (R. 281)

The court below concurred in the findings of the trial court and the Supreme Court of Hawaii to the effect that petitioner was engaged in interstate and foreign commerce to the extent of 75 per cent of its gross freight receipts (R. 325, 330), and that the Commission had made no inspection or investigation of it during the years in question. (R. 325, 326)

The court below then ruled that the Commission had the power of investigating petitioner's business. It examined the basis of the decision of the trial court to the effect that Congress had approved the Utility Act and held that upon the enactment of the Shipping Act Congress withdrew its approval and took over the field of the regulation of commerce upon the high seas; that although the Shipping Act, 1916 superseded the terri-

torial legislation, nevertheless the Commission retained power of investigation and regulation over commerce strictly local in character.

> "Here, there is nothing to show whether the Shipping Board has or has not acted in the field of intrastate commerce with respect to the matters specified in the territorial act. We cannot presume that it has. In view of that fact, and the presumption that a statute is valid, we think it is clear that the territorial act is effective as to intrastate commerce." (R. 334)

The court below then examined the question of the validity of an inspection fee measured by the gross receipts from interstate and foreign commerce; held that the burden of proof was upon the Commission to establish the fact that the fees are not disproportionate to the services rendered, and concluded that the Commission "must be deemed to have sustained that burden." (R. 335)

The court below pointed out that the expenditures by the Commission (regulating utilities other than petitioner) exceeded the total collections made by the Commission from all utilities and that the deficit had to be met by a legislative appropriation. (R. 336)

From this the court below concluded that the fees demanded of petitioner were not unreasonable or disproportionate to the services rendered to other utilities and sustained the exaction notwithstanding the fact that no services were rendered and no expense was incurred by the Commission in connection with this petitioner.

Although it was presented by the Assignment of Errors[6] and urged in the brief, the court below did not

[6] R. 293, errors numbered 4, 6, 9, and 10.

pass upon the validity of the fees under the Fifth and Fourteenth Amendments to the Constitution. The judgment of the Supreme Court of Hawaii was affirmed.

ERRORS TO BE URGED.

The Circuit Court of Appeals erred in:

(1) Holding that the Commission had sustained the burden of proof as to the reasonableness of the challenged fees when in fact it is conceded that no inspection, supervision, or regulation of petitioner has been made during the period in question and the Commission has incurred no expense whatever on account of petitioner in any inspection, supervision, or regulation;

(2) Failing to hold that the inspection fees demanded in this cause are void under the Fifth and Fourteenth Amendments to the Federal Constitution where it appears that no inspection, supervision, or regulation has ever been made by the Commission during the nine years in question;

(3) Holding that the Utility Act applies to petitioner;

(4) Holding that the enactment of the Shipping Act 1916 by Congress did not deprive the Commission of jurisdiction over petitioner, including the right to collect fees prescribed in the Utility Act;

(5) Holding that the fees prescribed in the Utility Act did not constitute a burden on interstate and foreign commerce, imports and exports, in violation of the Federal Constitution.

SUMMARY OF ARGUMENT.

The Circuit Court of Appeals erred in not holding that the inspection fees herein demanded which impinged upon petitioner's gross receipts from interstate, foreign and local commerce bore no relationship to the cost of inspection and supervision for the reason that the amount of earnings of petitioner and its capital stock afford no yardstick for determining the necessity or extent of inspection and supervision. Moreover, the court below erred in holding that the Commission had sustained the burden of proof as to the reasonableness of the challenged fees because the total receipts of the Commission from all utilities in the Territory were less than its total disbursements. The vital issue is whether the challenged fees are reasonable as to petitioner, not whether the Commission has spent all of the funds which have come into its hands since its organization. The fact that substantially all of the duties of the Commission are related to those utilities over which the Commission has complete and exclusive jurisdiction shows conclusively that the exaction of the identical fee from a utility under complete federal regulation is neither reasonable nor proportionate to the service performed or required.

We contend that the challenged fees are void under the Fifth and Fourteenth Amendments to the Federal Constitution in view of the admitted fact that during the nine years in question no inspection, supervision, or regulation has ever been made or attempted by the Commission with respect to this petitioner.

We further contend that with the enactment of the Shipping Act, 1916 and related federal legislation, Congress has placed the supervision and regulation of petitioner's business completely in the hands of federal

agencies and accordingly all power of the local Commission, including the power to collect the challenged fees, is unequivocally withdrawn. The Shipping Act, 1916 by its express terms applies to all transportation by water between the ports of Hawaii and the Circuit Court of Appeals' declaration that the act did not apply to purely local commerce between ports of the Territory is contrary to the plain language of the act. The holding of the court below that the Shipping Act 1916 was not effective as to intrastate commerce until the Board's representatives chose to exercise the powers and perform the duties entrusted to them under the act of Congress is an erroneous test of the delegation of legislative power.

Moreover, since the Utility Act itself expressly declares that it shall not apply to interstate and foreign commerce and since under the established facts petitioner is engaged in interstate and foreign commerce (to the extent of 42.2 per cent of its gross revenues) it follows that the Utility Act does not apply to it.

We further contend that the attempt on the part of the Commission to sustain the erroneous judgment of the Circuit Court of Appeals upon a ground rejected by that court and not even considered by the Supreme Court of Hawaii to the effect that Congress has approved the levying of what would otherwise be unconstitutional burdens on interstate and foreign commerce, is wholly without merit.

ARGUMENT.

I.

The Inspection Fees Demanded Admittedly Bear No Relation to the Cost of Inspection or Regulation and, Therefore, Impose Unconstitutional Burdens on Interstate and Foreign Commerce, and Are Void Under the Fifth and Fourteenth Amendments.

The finding of the court below affirming the findings of the trial court and the Supreme Court of Hawaii settles the fact that 75 per cent of petitioner's annual gross freight receipts were derived from the carriage of goods in interstate and foreign commerce. This business amounted to more than three-quarters of a million dollars annually or 42.2 per cent of petitioner's gross revenues. (R. 74)

The 75 per cent of petitioner's gross freight receipts found by all the lower courts to be interstate and foreign commerce was receipts from transportation of cargo on the high seas as a link in a continuous journey between ports of Hawaii and ports of continental United States and foreign countries. The fact of the continuity of transit from the several states and foreign countries to ports of Hawaii was stipulated at the trial. (R. 212) hence this business is interstate and foreign commerce.

Lord v. *Steamship Company,* 102 U. S. 541;
Galveston Ry. Co. v. *Texas,* 210 U. S. 217, 224, 228;
Carson Petroleum Co. v. *Vial,* 279 U. S. 94, 101.

It is conceded that the Commission has at no time during the period in question made any inspection, regulation, or supervision of petitioner's business, and incurred no expense on its account. Under these cir-

cumstances we contend that the inspection fees amounting to more than $4,000.00 per annum levied against petitioner's business indiscriminately (local, interstate, and foreign) are void as a direct burden on interstate and foreign commerce and deny to petitioner due process of law.

(1) The Territory cannot burden interstate and foreign commerce.

Under the commerce clause of the Federal Constitution, Congress is given the power to regulate interstate and foreign commerce and no state may burden such commerce, no matter what form the exaction takes (*Minnesota* v. *Blasius,* 290 U. S. 1, 9), and this whether a foreign or domestic corporation is involved (*Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 344; *Gloucester Ferry Company* v. *Pennsylvania,* 114 U. S. 196).

The limitations upon a territory with respect to burdening interstate and foreign commerce are the same as those imposed upon states. This was recognized by the court below:

> "* * * we think, as a practical matter, a territory must be considered in the same category as a state, and that the commerce clause is applicable to such territory. * * * If that point was not expressly so decided in *McLean* v. *Denver & Rio Grande R. R. Co.,* 203 U. S. 38, and *Hanley* v. *Kansas City Southern Ry. Co.,* 187 U. S. 617, it was so implied." (R. 328)

(2) The challenged fees are levied upon petitioner's interstate foreign and local business indiscriminately; this is an improper subject matter, hence the fees are invalid.

Any fee or tax laid on interstate or foreign commerce or the gross receipts therefrom or the right to engage in such commerce is invalid. The Commission will urge that since the petitioner also does, in addition to interstate and foreign commerce, a purely local business that therefore the Territory has the power to levy a burden upon all of the business of petitioner.

The vice of the exactions challenged here is that they are not taxes levied on local business but are fees levied against the entire business of petitioner without distinguishing or discriminating between that part of the business upon which a fee may be properly levied and that part of the business upon which the fee can not be levied.

The decisions of this Court make it clear that when a state attempts to levy such fees upon a corporation doing both local and interstate commerce then unless the statute by its terms is imposed solely on the local business the fact that the corporation does local business as well as interstate business is immaterial and the entire levy must fail. *Leloup* v. *Mobile,* 127 U. S. 640, where this Court held void a flat license tax of $225.00 on telegraph companies where the company did both local and interstate business:

> "* * * The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

The fees demanded in this cause "affect the whole business without discrimination" and "cover the entire operations of the company". It therefore follows that the fees as applied to petitioner are imposed upon an improper subject matter and are void.

See *Allen* v. *Pullman's Palace Car Company*, 191 U. S. 171. The fact that the Territory may not actually have intended to burden interstate or foreign commerce is immaterial. *Western Union* v. *Kansas*, 216 U. S. 1, 27.

In *Sprout* v. *South Bend*, 277 U. S. 163, a fee was imposed upon a carrier doing both interstate and intrastate business. In holding it invalid this Court after remarking that a state might by appropriate legislation require the payment of an occupation tax from one engaged in both intrastate and interstate commerce said:

> "* * * But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intra-state business." (p. 171.)

We contend that the Utility Act as construed by the court below making the fees attach to the total business of petitioner (foreign, interstate and local) is upon an improper subject matter and the challenged levy must fail regardless of the measure of the fees which is equally invalid. We now turn to the question whether the fees may be sustained as an inspection measure.

(3) The justification for all inspection fees must rest in the police power.

Whenever a state or a territory purports to exercise its police power to exact inspection fees from a carrier engaged in interstate and foreign commerce to defray

the expense incurred, two problems are presented: first, whether the federal statutes on the same matter exclude state regulation; and, second, do the fees burden interstate and foreign commerce. *Minnesota Rate Cases*, 230 U. S. 352, 397. Any state or territorial legislation affecting interstate commerce must meet this double test. If a state statute does burden interstate commerce, then whether it is in conflict with a federal statute or not need not be considered. *Lemke* v. *Farmer's Grain*, 258 U. S. 50. Likewise a determination that a state statute does not burden interstate commerce leaves open the question whether the statute is in conflict with applicable federal legislation. *Savage* v. *Jones*, 225 U. S. 501. Conversely, a decision that the act does not conflict with a federal statute leaves open the question whether or not the fees imposed in fact burden interstate and foreign commerce.

We contend, first, that the exaction of the fees under the Utility Act imposes an unconstitutional burden on interstate and foreign commerce and cannot be justified under the police power; and, second, assuming that reasonable fees representing the cost of investigation may be collected from a carrier engaged in interstate and foreign commerce, the fees here demanded are so unreasonable and admittedly bear no relation to the services rendered, that they are therefore void.

Assuming for the purposes of this discussion that the Shipping Act, 1916 does not prevent collection of these fees and that some fees may be collected from a corporation engaged in interstate and foreign commerce, we turn at once to the question whether or not the fees can be considered as proportionate to the cost and expenses of the alleged investigation.

The second clause of Section 10, Article I, of the United States Constitution, provides:

> "* * * No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection Laws * * *."

The Constitution does not expressly grant to the states the power to levy inspection fees on goods in interstate commerce; nevertheless the principle embodied in the foregoing clause of the Constitution has been extended to such commerce. *Patapsco Guano Co.* v. *Board of Agriculture,* 171 U. S. 345; *Great Northern Ry. Co.* v. *State of Washington,* 300 U. S. 154. All attempts by a state to exact fees for their police measures rest upon the same basis as the power to levy inspection fees. *Sprout* v. *South Bend,* 277 U. S. 163. Hence, all inspection fees of whatever kind or description must not exceed the reasonable cost of inspection.

> *Foote & Co.* v. *Stanley,* 232 U. S. 494;
> *A. & P. Tel. Co.* v. *Phila.,* 190 U. S. 160;
> *Western Union* v. *New Hope,* 187 U. S. 419;
> *Postal Tel. Cable Co.* v. *Taylor,* 192 U. S. 64.

(4) The fees demanded bear no reasonable relation to the cost of inspection and supervision, and since they are exacted from Petitioner, which does both interstate and local commerce, they must necessarily fail under the commerce clause.

As we have already noted, all three of the lower courts have held that the petitioner was engaged in interstate and foreign commerce. The Circuit Court of Appeals found that 42.2 per cent of petitioner's total revenues were derived from this source (R. 327), and held "* * * as a practical matter a territory must be considered in the same category as a state and that the

commerce clause is applicable to such territory." (R. 328) The Commission endeavors to escape the force of these findings by stating that we claim "a constitutional immunity because certain * * * freight before or after transportation * * * is carried by other carriers in interstate and foreign commerce." (Brief in Opposition to Certiorari, p. 12) We of course contend no such thing. The undisputed evidence is, and the findings of all courts below affirm the fact, that 75 per cent of petitioner's gross freight receipts are derived from the carriage of goods as a link in a continuous journey in interstate and foreign commerce. That such an act of carriage although conducted wholly between ports of the Territory is in interstate and foreign commerce can not be denied. *Galveston Ry. Co.* v. *Texas,* 210 U. S. 217; *Atchison, Topeka Ry.* v. *Harold,* 241 U. S. 371; *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95. Since it is established that petitioner is engaged in interstate and foreign commerce and that the challenged fees are inspection fees, they constitute a direct burden on interstate commerce and can be sustained only if they represent reasonable compensation for services performed or expenses incurred. *Interstate Transit Incorporated* v. *Lindsey,* 283 U. S. 183; *Ingels* v. *Morf,* 300 U. S. 290.

As we have seen before, utilities in Hawaii are divided into two distinct groups, those which are subject to federal control and those subject to territorial control exclusively. It is obvious that the need for supervision and regulation of the latter group is far greater than the need for inspection and supervision of the former. The Commission's services to the group under exclusive federal control were stated to be comparatively minor. (R. 115) Nearly all of the funds

exacted by the Commission from utilities operating in the Territory are in fact expended in the regulation and supervision of utilities over which the Commission has exclusive regulatory power. The Commission does not expend its funds on utilities already regulated and supervised by federal agencies. Upon cross-examination the auditor for the Commission testified:

> "Q. What relation then, Mr. Eaton, is there between the fees paid by the utility companies and the services performed by the Commission in connection therewith?
>
> "A. You ask the relation between the fees paid and the services performed?
>
> "Q. Yes.
>
> "A. It is my opinion there is very little relation. I believe the companies that paid the least amount of fees, at least in our experience, have been rendered the greatest services." (R. 152)

The fact that the fees are wholly unreasonable and disproportionate to the services performed is ably demonstrated by Commission's Exhibit A. (R. 69) This exhibit shows that from the period 1913 to 1930 the Commission (pursuant to the Utility Act) collected the sum of $181,671.41 from group A utilities (those under federal supervision and regulation) and during the same period it collected from group B utilities (under exclusive territorial supervision and regulation) the sum of $91,798.99. In other words the Commission collected twice as much from utilities it could not regulate as it did from those it could. Having made this disproportionate levy and collection in obedience to the Utility Act it thereupon proceeded to disburse the funds thus collected for the regulation of the utilities subject to the exclusive jurisdiction of the Commission.

The Commission's position throughout this cause has been that the challenged fees must be paid regardless of the fact that they bear no relation to the cost of inspection or investigation. It is contended that the reasonableness of the fees is not open to judicial inquiry because that fact has been concluded by the legislative fiat. Counsel are compelled to take this position because by the terms of the Utility Act which although originally providing for reasonable compensatory fees (Section 17, Appendix), was later amended to its present form to exact a fixed annual charge, there being no provision in the Utility Act to vary the amount of the levy depending upon either the actual inspection or regulation or the necessity therefor. Counsel for the Commission have consistently maintained that the reasonableness of the challenged fees is wholly immaterial. In the trial court they stated:

> "We contend that as a matter of law or will contend that it is immaterial entirely what the cost of making the investigations are of this company or any other company." (R. 120)

This view was accepted by the Supreme Court of Hawaii, which thought that the reasonableness of the fees "is a matter peculiarly within the province of the legislature to determine." (R. 281)

The novel suggestion is advanced that because we have not paid the fees demanded we are estopped to contest their validity. It would seem clear that it is not necessary for anyone to pay an unconstitutional levy in order to preserve a defense of its invalidity. If that were true, then no one could ever resist an unconstitutional exercise of power until he had first subjected himself to its operation. Moreover, the argument upon estoppel appears rather absurd when examined in the

light of the facts in this cause. From the year 1913 to 1921 petitioner did in fact pay these invalid fees and the only action of the Commission with respect to petitioner was to embark upon an attempt to regulate its rates in excess of the power of the Commission and contrary to the terms of the Shipping Act, 1916. This proceeding was declared void by the Supreme Court of Hawaii, *Re I. I. S. N. Co.*, 24 Haw. 136, 148.

Counsel for the Commission note the fact that it expended $7,239.58 in connection with petitioner's business during the years 1916 and 1917. They fail to state, however, that this entire expenditure was upon a proceeding in excess of the Commission's jurisdiction and was declared void by the Supreme Court of Hawaii. The suggestion is apparently offered for the purpose of showing that at one time the Commission did spend funds upon the petitioner and that therefore the present levies are valid. The suggestion, however, is entirely without force in view of the fact that the expenditure was made under a mistaken view of its powers and, moreover, has no relevancy to the years 1922 to 1930, inclusive, the years in controversy.

Apparently the Commission's theory is that petitioner is obliged to continue payment of the unreasonable and disproportionate levies in perpetuity upon the theory that the Commission, although it has never exercised the asserted power to investigate and bring complaints before the federal bodies having jurisdiction, it may at some future time do so and this bare possibility is a sufficient basis upon which to predicate the validity of the challenged fees.

The Circuit Court of Appeals thought that the fact that 60 to 80 per cent of the receipts of the Commission were expended for the regulation and supervision of

utilities over which it had exclusive supervision and control was immaterial, giving for its reason "A citizen of a city paying taxes to support a police force cannot avoid payment of the tax on the ground that he has not used the service of the police." (R. 336) In other words, in the view of the court below the challenged inspection fees were valid even though they admittedly bore no relation to the cost of or need for inspection.

That the court below misconceived the very nature of inspection fees levied against interstate commerce is apparent. It thought that the reasonableness of the fees was determined by the fact that the Commission had expended all of the funds it had received from all sources and that a legislative appropriation was necessary to supplement its budget. If this were in reality a tax and not an inspection fee there might be some force in the argument (except for the fact that a tax laid upon gross receipts including those from interstate commerce is void). While a state may adopt an arbitrary measure of classification in the levying of excise or occupation taxes for the privilege of doing intrastate business, when it levies a charge which in reality is an inspection measure, it is confined in its levy to "fair compensation for what it gives." *Interstate Transit Incorporated* v. *Lindsey*, 283 U. S. 183. Hence the fact that this Commission has expended in past years all of its receipts derived under the Act is immaterial in determining the question whether the fee sought to be exacted from this petitioner bears any reasonable relation or proportion to the service rendered or inspection performed. We submit that the undisputed evidence conclusively establishes the fact that the fees demanded constitute an unreasonable

burden on interstate and foreign commerce; they bear no reasonable relation to the cost of inspection or investigation and must therefore fail.

(5) Where inspection fees are assessed against a number of unrelated public utilities and are deposited in a common fund to be used by the Commission for the regulation and inspection of utilities generally, the burden of proof is upon the Commission to prove that the fees demanded are no more than necessary to defray the expense of regulation or inspection.

The Utility Act by definition applies to a large assortment of unrelated utilities, gas, electric, telephone, telegraph, and street railroad companies, wharfingers, warehousemen, and carriers by water. All are made liable for the fees irrespective of the character of their business, whether local, foreign, or interstate. The funds collected by the Commission are used for the most part in the regulation of utilities which are not subject to federal regulation. This presents the same situation that was before this Court in *Great Northern Ry. Co.* v. *State of Washington*, 300 U. S. 154. This Court held that under such circumstances the burden of proof was upon the state to establish the reasonableness of the fees as to the Great Northern Railway.

The Supreme Court of Hawaii held that the burden of proof was on petitioner and that it had failed to sustain the burden.

That court held the test of reasonableness was not the cost or expense to which the Commission was put

---

[1] The fees levied by the Utility Act differ from those imposed by the Washington statute in that the former impinge indiscriminately on local, interstate, and foreign business while the latter were confined to local business; hence, the Utility Act as construed by the court below is open to the charge that as to this petitioner the act is void on its face. The Washington statute held invalid is printed in Appendix, p. 57.

in regulating and inspecting petitioner, but what would have been a reasonable expense had the Commission made any inspection.

> "It does not appear from the Act itself, and the record is silent on the subject, that the amounts sought to be collected from the defendant for the years in question would exceed that necessary to meet the expense of its investigation had the commission found it necessary to perform this duty." (R. 281)

The decision of the Supreme Court of Hawaii was rendered on July 25, 1936, and that court did not have before it the decision of this Court in *Great Northern Ry. Co.* v. *State of Washington,* which case was decided February 1, 1937.

The court below, however, reversed the ruling of the Supreme Court of Hawaii on the question of the burden of proof, but concluded (despite the fact there was no evidence to support the conclusion) that:

> "We believe Appellee (the Commission) 'must be deemed to have sustained that burden' as stated in *Bourjois, Inc.* v. *Chapman,* 301 U. S. 183, 187." (R. 335)

In other words, in face of an inspection fee levied against a number of unrelated public utilities and deposited in a common fund for the regulation of all, and in face of the undisputed evidence that the Commission in this cause has never expended any sum in the inspection, supervision, or regulation of petitioner during the entire period (nine years) under consideration, the court below has held that the Commission has sustained the burden of proof that the fees here demanded are reasonable.

(6) The uncontradicted evidence is that the Commission has expended nothing for nine years in regulating or inspecting Petitioner; this fact is conclusive that inspection fees of $4,000.00 per annum are excessive.

If a state or a public utility commission may be said to have sustained the burden of proof in a case where it has put on literally no evidence as to the cost of inspection and admits that no inspection or supervision has ever been made by it, then the holding of this Court in *Great Northern Ry. Co.* v. *State of Washington* is in truth overruled by the decision of the court below in this cause.

The authority for the statement by the court below that the Commission has sustained the burden of proof is *Bourjois, Inc.* v. *Chapman* (supra). In that case only a nominal fee was involved and an injunction was sought prior to the effective date of the act. In other words, at the time the statute was questioned in that case no expenses in investigation had been incurred since the act was not yet in operation. To apply such a case to the facts presented in this cause appears to us absurd, for, in the case here under consideration, this Commission has not lifted a finger in the regulation, supervision, or inspection of petitioner for nine years, and at the same time says that $4,000.00 a year is a reasonable inspection fee.

The court below misunderstood the holding of this Court in *Great Northern Ry. Co.* v. *State of Washington*, for it examines the record and comes to the conclusion that, since the total receipts of the Commission under the Utility Act were less than its total disbursements, therefore the fees assessed against petitioner are reasonable. This is the very thing which this Court has said is not the law. Where fees are collected

and deposited in a common fund for the regulation of a number of public utilities, it must appear that the fees collected from the particular public utility in question are reasonable. The issue involved is not whether the Commission has from all sources obtained a reasonable sum for the performance of its general duties in connection with all other utilities, but rather has the Commission collected a reasonable fee against a particular utility, which fee represents the reasonable expenses incurred in the investigation and regulation of that utility?

That the court below misunderstood the nature of inspection fees and the decision of this Court in *Great Northern Ry. Co.* v. *State of Washington* (supra) is apparent from the following statement:

> "There is here no charge that the exaction is to be used for a purpose other than the legitimate one of supervision and regulation." (R. 335)

From this the court's idea of a reasonable inspection fee is not to defray any expense which has been incurred in inspection, but a holding that, if the fee is in the future to be used for the purpose of supervision and regulation, then it is valid. If this were the criterion, then no inspection fee could ever be challenged as excessive for the reason that the inspecting agency could always assert that, although it had incurred no expense to date in inspection and regulation, it contemplated that some time in the indefinite future, expenses in inspection would be incurred, and that the sums collected from the utility would in the future be used for the purpose of regulating it. Under the view of the court below no force is attributed to the palpable fact that in this cause the Commission has expended nothing on petitioner for more than nine years.

The Commission's long history of non-supervision and non-regulation of petitioner reflects the fact that regulatory jurisdiction has been turned over to federal agencies. To square with constitutional principles the Legislature of Hawaii should have reduced the fees to be collected from petitioner to a sum comparable to the amount expended by the Commission on its behalf. The failure to do this renders the whole charge void.

Foote v. *Stanley*, 232 U. S. 494;
Great Northern Ry. Co. v. *State of Washington*, 300 U. S. 154.

(7) The fees sought to be collected are so excessive as to amount to a taking of Petitioner's property without due process of law in violation of the Fifth and Fourteenth Amendments.

We contend that the fees here demanded are void under the Fifth and Fourteenth Amendments to the Federal Constitution. We recognize that there may be doubt as to whether the Fourteenth Amendment which, strictly speaking, is a restraint upon states, has any application in a territory. Nevertheless, the guarantees afforded to persons and corporations of the states under the Fourteenth Amendment are afforded to persons and corporations in the territories under the Fifth Amendment.

Farrington v. *Tokushige*, 273 U. S. 284, 299.

Petitioner is subject to complete federal control by the Shipping Board under the Shipping Act, 1916 (Infra p. 32). Evidence was tendered and rejected which would have shown the minute detail of federal regulation (R. 213-215). The Commission concedes that it has no power of regulation over petitioner or to compel petitioner to act in any matters covered by the Shipping Act, 1916 and related federal legislation.

We concede that where a particular class must be inspected or investigated by the state it is proper to make the members of the class bear the burden of the cost of investigation. Superficially, the Utility Act would seem to treat all utilities alike by compelling them to contribute to a common fund used for the investigation of utilities generally. It is clear that a statute valid on its face may be invalid in its application.

The evidence in this cause is undisputed that the fees sought to be collected have no relation to expenditures on petitioner's account. In substance, the exaction of fees amounting to $4,000.00 annually is made not for the purpose of investigating petitioner, but for the purpose of investigating other utilities over which the Commission has regulatory jurisdiction. Hence, apart from the fact that these fees burden interstate and foreign commerce, we contend they are so excessive as to deny petitioner due process of law.

What we have already said as to the unreasonableness of the fees as a burden on interstate and foreign commerce applies equally to this contention that the fees are excessive under the Fifth and Fourteenth Amendments. It is to be remembered that the Legislature is not exercising the taxing power in levying the fees here challenged, but is exercising its police power for the purpose of defraying the cost of investigation and inspection. Measured by any yardstick, the fees here in question, exceeding $4,000.00 per annum, exacted for doing nothing in a subject matter in which Congress has already acted and deposited regulatory power in federal agencies, cannot be justified under the Fifth or Fourteenth Amendments.

II.

Under the Proper Construction of the Shipping Act, 1916 and the Utility Act, the Commission Has No Jurisdiction Over the Petitioner and Cannot Collect the Fees Demanded.

Apart from the matters discussed under Point I in this brief, we contend that as a matter of statutory construction of the Utility Act and the Shipping Act, 1916 these fees cannot be collected.

Upon the enactment of the Shipping Act, 1916 Congress took over the field of regulating transportation on the high seas within the Territory and petitioner was placed under the jurisdiction of the Shipping Board (*Re: I. I. S. N. Co.*, 24 Haw. 136). As this Court has said the Shipping Act, 1916 "closely parallels the Interstate Commerce Act; and * * * Congress intended that the two Acts, each in its own field, should have like interpretation, application, and effect." *U. S. Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 481.

The exclusive effect of Congressional action in the field of interstate commerce has been settled by this Court (*Chicago R. I. & P R. Co.* v. *Hardwick Farmers Elev. Co.*, 226 U. S. 426; *Penn. Railroad* v. *Public Service Commission*, 250 U. S. 566), and the court below correctly held that the same rule applied to this cause:

> "The exclusive effect of Congressional action is quite clear. Thus in the case last cited, it is said that 'there can be no divided authority over interstate commerce.' The states may not 'complement' the act of Congress, or prescribe 'additional regulations' or 'auxiliary provisions for the same purpose' (Prigg v. Pennsylvania, 41 U. S. [16 Pet.] 536, 617; New York Central R. R. Co. v. Winfield, 244 U. S. 147, 153), nor 'supplement' such act." (R. 331)

However, the court below then distinguished between intrastate commerce and interstate commerce, holding that as to the former (commerce between ports of the Territory) the Shipping Act, 1916 did not supersede the Utility Act for the reason that there was no evidence to show that the Shipping Board had actually performed the duties devolving upon it under the terms of the act.

> "Here, there is nothing to show whether the Shipping Board has or has not acted in the field of intrastate commerce with respect to the matters specified in the territorial act. We cannot presume that it has. In view of that fact, and the presumption that a statute is valid, we think it is clear that the territorial act is effective as to intrastate commerce." (R. 33)

This ruling is in direct conflict with the decision of this Court in *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 613:

> "The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power."

The exclusive effect of Congressional action in this field cannot be made dependent upon the activity or non-activity of the employees of the federal agency designated by Congress to perform the duties prescribed in the act. If this were so, then a failure on the part of the personnel of any federal agency to perform its statutory duties would be sufficient to justify the states or territories in proceeding with regulation in the face of a Congressional statute on the subject. Carried to its logical extreme, it would mean that, so

long as active regulation was conducted by the federal agency, state or territorial power would be superseded, but whenever the federal agency ceased to act, state or territorial power at once would be called into being.

Furthermore, the court below completely overlooked the fact that the Shipping Act, 1916 placed in the Shipping Board jurisdiction over all transportation by water on the high seas between ports of the Territory. This Congress could do in the exercise of its plenary power over territories. Therefore, regardless of the nature of the commerce, whether intrastate or interstate, there was nothing left within the jurisdiction of the local Commission; Congress had completely taken over the field.

Luckenbach v. *Denny,* 152 Wash. 548, 559.
McNeely & Price Co. v. *Phila. Piers, Inc.,* 329 Pa. 113, 134.

III.

Counsel's Attempt to Justify the Erroneous Judgment Below Upon a Ground Ignored by the Supreme Court of Hawaii and Rejected by the Circuit Court of Appeals is Without Merit.

We will not encumber this brief with any full discussion of the basis upon which the trial court rendered its decision in this cause. In brief, the trial court found that the challenged fees burdened interstate and foreign commerce, were invalid in the absence of Congressional approval, that Congress had approved the Utility Act, thereby validating what would otherwise be unconstitutional burdens on interstate and foreign commerce. The basis of the trial court decision was so obviously unsound that it was ignored by the Supreme Court of Hawaii. The Circuit Court of Appeals, how-

ever, referred to it and rejected the conclusion of the trial court.

The court below, in the course of its opinion, says:

> "Appellee contends that Congress expressly ratified the act creating the commission by its Act of March 28, 1916. Appellant seems not to differ with that view, and we may here assume that Congress did consent to regulation of interstate and foreign commerce within the Territory by appellee. But it is obvious that some five months later Congress withdrew its consent to regulation of such commerce, * * * by enactment of the Shipping Act." (R. 330)

Were it not for the remark that we seemed "not to differ with that view" we would not discuss this phase of the case at all. We are at a loss to discover how the court below assumed that we did not differ from the contention that Congress had approved the regulation of interstate and foreign commerce by the Commission; the contrary view was fully presented both in the briefs and argument. Lest we be deemed to acquiesce in this remark of the court below we will briefly summarize our contentions on this point.

At the outset it should be borne in mind that the Utility Act was never submitted to Congress for its approval. Section 55 of the Hawaiian Organic Act[1] provides that "no special or exclusive" franchises may be granted by the Territory without Congressional approval. A number of utilities (other than petitioner) doing business in the Territory held franchises approved by Congress, and with the enactment of the Utility Act in 1913 it was thought advisable to make those franchises specifically subject to the Utility Act;

[1] 31 Stat. 150, Appendix, p. 57.

hence, Act 135 of the Session Laws of Hawaii 1913 was passed (Appendix p. 48). The purpose of this act was to make sure that public utilities holding franchises would be subject to the provisions of the Utility Act (Opinion, Supreme Court of Hawaii, R. 17). It had nothing to do with the obtaining of Congressional approval to the exaction of the fees prescribed by the Utility Act.

Act 135, Session Laws of 1913, was entitled:

> "An Act
>
> Relating to Certain Gas, Electric Light and Power, Telephone, Railroad and Street Railway Companies and Franchises in the Territory of Hawaii and Amending the Laws Relating Thereto."

The body of Act 135 provided that certain franchises which had been granted by the Legislature of Hawaii and approved by Congress and "the persons and corporations holding said franchises shall * * * be subject to the provisions of Act 89 (the Utility Act)." This Act 135 did not apply to petitioner for the reason that it never held a franchise from the Territory. Moreover since petitioner in 1913 was a public utility within the meaning of the Utility Act there was no occasion for additional legislation with respect to it. Act 135 was approved and amended by Congress on March 28, 1916 (39 Stat. 38, c. 53, Appendix p. 49), an Act entitled:

> "An Act
>
> To ratify, approve, and confirm an act duly enacted by the Legislature of the Territory of Hawaii relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto."

Congress adding to the territorial act the following language:

> "* * * all franchises heretofore granted to any other public utility or public utility company and all public utilities and public utilities companies organized or operating within the Territory of Hawaii * * *."

When Act 135 was approved by Congress petitioner was not included by the language inserted by Congress under the rule of *noscitur a sociis*. Congress probably intended to make sure that all franchise-bearing corporations were made subject to the provisions of the Utility Act. This was the view taken by the Supreme Court of Hawaii (*In Re: I. I. S. N. Co.*, 24 Haw. 136, 145), and this construction is further borne out by the fact that the title to the act remained unchanged.

Assuming that petitioner does fall within the language inserted by the act of Congress, it by no means follows that the act of Congress has the effect of giving Congressional assent to the burdening of interstate and foreign commerce by the collection of the fees here in question.

The short answer to the reasoning of the trial court is that no act of Congress can be pointed to whereby Congress has approved the burdening of interstate and foreign commerce by the Territory. In fact in the Utility Act the Territory expressly disclaimed any intention to interfere with interstate or foreign commerce.

> "This chapter shall not apply to commerce with foreign nations, or commeree with the several states of the United States, except in so far as the same may be permitted under the Constitution and laws of the United States * * *."
> (Rev. L. Hawaii 1925 Section 2210)

The trial court ruled that when Congress approved Act 135 (which Act subjected certain franchise-bearing utilities to the Utility Act), it indirectly approved the Utility Act, and that, since Congress in this roundabout manner "approved" the Utility Act, which Act itself provided that it should not apply to interstate or foreign commerce, then the very "approval" of the Utility Act *ipso facto* changed the Utility Act to make it specifically applicable to interstate and foreign commerce.

To put it another way, in the view of the trial court, Congress approved a territorial statute, which statute expressly stated that it did not apply to interstate and foreign commerce; hence, the act of Congress in approving the territorial statute had the effect of changing it so that it forthwith applied to interstate and foreign commerce. Undoubtedly, because of this specious reasoning the Supreme Court of Hawaii ignored the basis of the trial court's decision.

As we have said before, the Circuit Court of Appeals noticed and rejected the conclusion of the trial court, the Circuit Court of Appeals ruling that, even assuming that Congress had approved the Utility Act, with the enactment of the Shipping Act it thereby withdrew its approval.

Either of the reasons stated above is a conclusive answer to the trial court's curious conclusion that Congress had approved the levying of what would otherwise be unconstitutional burdens on interstate and foreign commerce by the Territory of Hawaii.

CONCLUSION.

The respondent in this cause asserts the right to exact inspection fees in substantial sums from petitioner, a steamship company under full and complete regulation by federal agencies. The findings of all of the courts below are that petitioner during the years in question did a substantial business in the carriage of goods in interstate and foreign commerce and that during this period the Commission has expended nothing in the regulation or inspection of petitioner.

We have shown that the fees here demanded are laid indiscriminately on interstate, foreign and local commerce of petitioner and hence are upon a subject matter which the Territory is without power to burden. Moreover, the uncontradicted evidence is that these fees bear no relation to the cost of or need for inspection or supervision and that in fact petitioner is a member of a class of utilities under the complete regulation of federal agencies and the sums demanded from this class are upon the identical basis as the fees demanded of that class of utilities over which the Commission has exclusive jurisdiction. This alone is sufficient to render the fees invalid.

The Circuit Court of Appeals, in face of an authoritative decision by this Court to the contrary (*Great Northern Ry. Co.* v. *State of Washington*), has declared that fees in the sum of $4,000.00 per annum are reasonable inspection fees notwithstanding the fact that the record discloses, and the Commission concedes, that no inspection was made and no expense was incurred by it on petitioner's account. The holding is a result of a misunderstanding of the nature of inspection fees and the basis of their justification, and the re-

sult of a misapplication of the decisions of this Court. It should not be permitted to stand.

The court below has also laid down a palpably erroneous rule on the interpretation of the delegation of legislative power to the effect that, until the agents of the Shipping Board exercise their powers, the Shipping Act, 1916 does not have the effect of superseding territorial legislation. This again is in direct conflict with the decisions of this Court.

We submit that the judgment below should be reversed and that the complaint should be dismissed.

Respectfully submitted,

GARNER ANTHONY,
Counsel for Petitioner.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

Dated Washington, D. C.,
October 27, 1938.

APPENDIX

APPENDIX

APPENDIX.

For convenient reference, here follows a digest of the applicable territorial and federal statutes, the pertinent portions of which are quoted verbatim and are so indicated by quotation marks:

Ch. 132, Revised Laws of Hawaii 1925:

This statute was originally Act 89 of the Session Laws of 1913, as amended by Act 127 of the Session Laws of 1913, and took effect on July 1, 1913; the reference to sections are to Revised Laws of Hawaii 1925.

Sec. 2189 provides for the number and appointment of commissions.

Sec. 2190 empowers the Commission to appoint attorneys, engineers, accountants, and other assistants.

Sec. 2191 provides for an annual report by the Commission to the Governor.

Sec. 2192 gives the Commission general supervision over all public utilities in the Territory.

Sec. 2193 provides:

> "The commission and each commissioner shall have power to examine into the condition of each public utility doing business in the Territory, the manner in which it is operated with reference to the safety or accommodation of the public, the safety, working hours and wages of its employees, the fares and rates charged by it, the value of its physical property, the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relations with other persons, companies or corporations, its compliance with all applicable territorial

and Federal laws and with the provisions of its franchise, charter and articles of association, if any, its classifications, rules, regulations, practices and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations. Any such investigation may be made by the commission on its own motion, and shall be made when requested by the public utility to be investigated, or upon a sworn written complaint to the commission, setting forth any prima facie cause of complaint. All hearings conducted by the commission shall be open to the public. A majority of the commission shall constitute a quorum."

Sec. 2194 obliges all public utilities, upon request, to permit examination of the books and furnish required information.

Sec. 2195 requires each utility to report accidents to the Commission.

Sec. 2196 empowers the Commission to take testimony, compel the attendance of witnesses, and the production of evidence.

Sec. 2197 requires each utility to publish its rates, charges and rules in the manner required by the Commission.

Sec. 2198 provides for notices to utilities of hearings on proceedings and complaints.

Sec. 2199 permits a utility to appear by counsel and examine any witnesses called.

Sec. 2200 empowers the Commission to make rules respecting procedure.

Sec. 2201 provides:

"If the commission shall be of the opinion that any public utility is violating or neglecting to comply with any territorial or federal law, or any provision of its franchise, charter, or articles of association, if any, or that changes, additions, extensions or repairs are desirable in its plant or service in order to meet the reasonable convenience or necessity of the public, or to insure greater safety or security, or that any rates, fares, classifications, charges or rules are unreasonable or unreasonably discriminatory, or that in any way it is doing what it ought not to do, or not doing what it ought to do, it shall in writing inform the public utility of its conclusions and recommendations, shall include the same in its annual report, and may also publish the same in such manner as it may deem wise. The commission shall have power to examine into any of the matters referred to in section 2193, notwithstanding that the same may be within the jurisdiction of the interstate commerce commission, or within the jurisdiction of any court or other body, and when after such examination the commission shall be of the opinion that the circumstances warrant, it shall be its duty to effect the necessary relief or remedy by the institution and prosecution of appropriate proceedings or otherwise before the interstate commerce commission, or such court or other body, in its own name or in the name of the Territory, or in the name or names of any complainant or complainants, as it may deem best."

Sec. 2202 provides:

"All rates, fares, charges, classifications, rules and practices made, charged, or observed by any public utility, or by two or more public utilities, jointly, shall be just and reasonable, and the commission shall have power, after a hearing upon its

own motion, or upon complaint, and in so far as it is not prevented by the Constitution or laws of the United States, by order to regulate, fix and change all such rates, fares, charges, classifications, rules and practices, so that the same shall be just and reasonable, and to prohibit rebates and unreasonable discriminations between localities, or between users or consumers under substantially similar conditions. From every order made by the commission under the provisions of this section an appeal shall lie to the supreme court of Hawaii in like manner as an appeal lies from an order or decision of a circuit judge at chambers. Such appeal shall not of itself stay the operation of the order appealed from, but the supreme court may stay the same, after a hearing upon a motion therefor, upon such conditions as it may deem proper as to giving a bond and keeping the necessary accounts or otherwise in order to secure a restitution of the excess charges, if any, made during the pendency of the appeal in case the order appealed from should be sustained in whole or in part."

Sec. 2203 empowers the Commission to investigate rates made by persons holding water leases from the Territory of Hawaii.

Sec. 2204 provides the procedure by the Commission to secure to consumers reasonable rates for water and to cancel water leases and licenses charging unreasonable rates.

Sec. 2205 provides a penalty of one thousand dollars for every violation of any order of the Commission or of any provision of this chapter.

Sec. 2206 provides that any person testifying falsely before the Commission shall be guilty of perjury.

Sec. 2207 provides:[1]

"All salaries, wages and expenses, including traveling expenses, of the commission, each commissioner and its officers, assistants and employees, incurred in the performance or exercise of the powers or duties conferred or required by this chapter, may be paid out of any appropriation available for the purpose. Section 2542 shall apply to the commission and each commissioner, as well as to the supreme and circuit courts and the justices and judges thereof, and all costs and fees paid or collected hereunder shall be deposited in the treasury of the Territory to the credit of a special fund to be called the 'Public Utilities Commission fund' which is created for the purpose. There shall also be paid to the commission in each of the months of March and September in each year by each public utility which is subject to investigation by the commission a fee which shall be equal to one-twentieth of one per cent. of the gross income from the public utility business carried on by such public utility in the Territory during the preceding year, plus one-fiftieth of one per cent. of the par value of the stock issued by such public utility and outstanding on December 31 of the preceding year, if its principal business is that of performing public utility services in the Territory. Such fee shall likewise be deposited in the treasury to the credit of the fund. The moneys in the fund are appropriated for the payment of all salaries, wages and expenses authorized or prescribed by this chapter."

Sec. 2208 provides:

"The term 'public utility' as used in this chapter shall mean and include every person, company or

[1] This section was originally Section 17 of Act 89 S. L. 1913 and provided for "reasonable" fees, the original section is printed in Appendix, p. 47.

corporation, who or which may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for the transportation of passengers or freight, or the conveyance or transmission of telephone or telegraph messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air between points within the Territory, or for the production, conveyance, transmission, delivery or furnishing of light, power, heat, cold, water, gas or oil, or for the storage or warehousing of goods."

Sec. 2209 provides:

"If any section, sub-section, sentence, clause or phrase of this chapter shall for any reason be held to be invalid as to any or all matters within its terms, such decision shall not affect the validity of the remaining portions of this chapter, or the validity of such portion as to any other matter within its terms."

Sec. 2210 provides:

"This chapter shall not apply to commerce with foreign nations, or commerce with the several states of the United States, except in so far as the same may be permitted under the Constitution and laws of the United States; nor shall it apply to public utilities owned or operated by the Territory, or any county or city and county, or other political division thereof."

For convenience of the Court there is reprinted hereunder the original Section 17 of Act 89, S. L. 1913, creating the Public Utilities Commission, which related to the fees to be collected by the Commission to defray its expenses.

Act 89 Session Laws of 1913:

"Section 17. Finances. All salaries, wages and expenses, included traveling expenses, of the commission, each commissioner and its officers, assistants and employees, incurred in the performance or exercise of the powers or duties required or conferred by this Act, may be paid out of any appropriation available for the purpose. *The commission shall prescribe and collect reasonable costs and fees for services rendered by it,* and shall deposit the same into the treasury of the Territory to the credit of a special fund to be called the "Public Utilities Commission Fund," which is hereby created for the purpose. There shall also be paid to the commission in the months of January and July of each year by each public utility which is subject to investigation by the commission a fee which shall be equal to one-fortieth of one per cent of the aggregate par value of the stock and bonds issued by such public utility and outstanding on December 31 of the preceding year. Such fee shall likewise be deposited in the treasury to the credit of said fund. The moneys in said fund are hereby appropriated for the payment of all salaries, wages and expenses authorized or prescribed by this Act."

(Italics ours.)

Act 135, Session Laws of 1913 provides:

"AN ACT

"Relating to Certain Gas, Electric Light and Power, Telephone, Railroad and Street Railway Companies and Franchises in the Territory of Hawaii and Amending the Laws Relating Thereto.

"Be it Enacted by the Legislature of the Territory of Hawaii:

"Section 1. The franchises granted by Act 30 of the Laws of 1903 of the Territory of Hawaii, as amended and approved by an Act of Congress approved April 21, 1904, Act 48 of the Laws of 1903 of said Territory, as amended and approved by an Act of Congress approved April 21, 1904, Act 66 of the Laws of 1905 of said Territory, as amended and approved by an Act of Congress approved June 20, 1906, Act 105 of the Laws of 1907 of said Territory, as amended and approved by an Act of Congress approved February 6, 1909, Act 130 of the Laws of 1907 of said Territory, as amended and approved by said Act of Congress, approved February 6, 1909, Act 115 of the Laws of 1909 of said Territory, as amended and approved by an Act of Congress approved June 25, 1910, and Act 66 of the Laws of 1911 of said Territory, as amended and approved by an Act of Congress approved August 1, 1912, and the persons and corporations holding said franchises, shall be subject as to reasonableness of rates, prices and charges and in all other respects to the provisions of Act 89 of the Laws of 1913 of said Territory creating a public utility commission and all amendments thereof for the regulation of public utilities in said Territory, and all the powers and duties expressly conferred upon or required of the Superintendent of Public Works or the courts by said acts granting said franchises are hereby conferred upon and required of said public utility commission and any commission of similar character that may hereafter be created by the laws of said Territory; and said acts granting said franchises are hereby amended to conform herewith.

"Section 2. This Act shall take effect upon its approval by the Congress of the United States.

"Approved this 29th day of April, A. D. 1913.

"WALTER F. FREAR,
"Governor of the Territory of Hawaii."

Act of Congress of March 28, 1916 (39 Stat. at L. 38, c. 53), provides:

"An Act to ratify, approve, and confirm an act duly enacted by the Legislature of the Territory of Hawaii relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of the Legislature of the Territory of Hawaii, entitled 'An Act relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto,' approved by the governor of the Territory April twenty-ninth, nineteen hundred and thirteen, be, and is hereby, amended, ratified, approved, and confirmed, as follows:

'ACT 135

'An act relating to certain gas, electric light and power, telephone, railroad, and street railway companies and franchises in the Territory of Hawaii, and amending the laws relating thereto.

'Be it enacted by the Legislature of the Territory of Hawaii:

'Section 1. The franchises granted by act thirty of the laws of nineteen hundred and three, of the Territory of Hawaii, as amended and approved by an Act of Congress approved April twenty-first, nineteen hundred and four; act forty-eight of the laws of nineteen hundred and three of said Territory, as amended and approved by an Act of Congress approved April twenty-first, nineteen hundred and four; act sixty-six of the laws of nineteen hundred and

five of said Territory, as amended and approved by an Act of Congress approved June twentieth, nineteen hundred and six; act one hundred and five of the laws of nineteen hundred and seven of said Territory, as amended and approved by an Act of Congress approved February sixth, nineteen hundred and nine; act one hundred and thirty of the laws of nineteen hundred and seven of said Territory, as amended and approved by said Act of Congress approved February sixth, nineteen hundred and nine; act one hundred and fifteen of the laws of nineteen hundred and nine of said Territory, as amended and approved by an Act of Congress approved June twenty-fifth, nineteen hundred and ten; act sixty-six of the laws of nineteen hundred and eleven of said Territory, as amended and approved by an Act of Congress approved August first, nineteen hundred and twelve; and all franchises heretofore granted to any other public utility or public-utility company, and all public utilities and public-utilities companies organized or operating within the Territory of Hawaii, and the persons and corporations holding said franchises shall be subject as to reasonableness of rates, prices, and charges and in all other respects to the provisions of act eighty-nine of the laws of nineteen hundred and thirteen of said Territory creating a public-utilities commission and all amendments thereof for the regulation of public utilities in said Territory; and all the powers and duties expressly conferred upon or required of the superintendent of public works by said acts granting said franchises are hereby conferred upon and required of said public-utilities commission and any commission of similar character that may hereafter be created by the laws of said Territory; and said acts granting said franchises are hereby amended to conform herewith; *Provided, however,* That nothing herein contained shall in

any wise limit the jurisdiction or powers of the Interstate Commerce Commission under the Acts of Congress to regulate commerce: *And provided further,* That all acts of the public-utility commission herein provided for shall be subject to review by the courts of the said Territory.

'Section 2. This act shall take effect upon its approval by the Congress of the United States.

'Approved this twenty-ninth day of April, anno Domini nineteen hundred and thirteen.

'WALTER F. FREAR,
'Governor of the Territory of Hawaii.'

'Approved, March 28, 1916.' "

Shipping Act, 1916 (U.S.C. Title 46, Sec. 801, et seq., 39 Stat. at L. c. 451, p. 728), the references below to sections are to United States Code Annotated:

Sec. 801 provides:

"The term 'common carrier by water in foreign commerce' means a common carrier, except ferry-boats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: PROVIDED, That a cargo boat commonly called an ocean tramps shall not be deemed such 'common carrier by water in foreign commerce.'

"The term 'common carrier by water in interstate commerce' means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

* * *"

Sec. 804 provides for the creation of the United States Shipping Board and the appointment of a board of seven commissioners.

Sec. 805 fixes the salaries of the members of the board, authorizes the board to employ and fix the compensation of attorneys, officers, naval architects, special experts, examiners, clerks, and other employees.

Sec. 806 provides for the transfer of vessels belonging to the War or Navy Department to the board.

Sec. 811 authorizes the board to investigate the relative cost of building merchant vessels in the United States and in foreign countries, and report its findings to Congress.

Sec. 812 prohibits common carriers by water to enter into any understanding or agreement to pay or allow deferred rebates to any shipper or to discriminate against any shipper.

Sec. 813 provides for hearings before the board, either on its own motion or upon complaints after notice, on the question whether or not any carrier has violated any provision of Sec. 812, or entered into any agreement with anyone for deferred rebates or other unfair practices.

Sec. 814 provides that every common carrier shall file with the board all written contracts with any other person subject to the chapter, relating to the fixing or regulating of rates or fares, or controlling competition. The board is authorized to cancel or modify any contract in the event it finds the same discriminatory or unfair between carriers, shippers, exporters, importers, or if it operates to the detriment of the commerce of the United States. Violation of this section carries a pen-

alty of one thousand dollars a day and is recoverable in civil actions.

Sec. 815 prohibits carriers from giving any unreasonable preference to any person or of any particular traffic and prohibits the allowance to any person of transportation at less than established rates by means of false building or any unfair device.

Sec. 816 prohibits discrimination between shippers of the United States and foreign competitors and provides that the board, after hearing, may enter a desist order.

Sec. 817 provides:

> "Every common carrier by water in interstate commerce shall establish, observe and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.
>
> "Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

"No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increase proposed to be made; but the board for good cause shown may waive such notice.

"Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice."

Sec. 818 prohibits the reduction of rates for the purpose of injuring a competitive carrier.

Sec. 819 prohibits a carrier from disclosing information to any person other than the shipper or consignee of the nature, kind, destination and routing of any freight.

Sec. 820 provides for the filing of periodic reports by carriers.

Sec. 821 provides that any person may file a sworn complaint with the board, and empowers the board to direct the payment of reparation.

Sec. 822 provides that orders of the board relating to any violation of the chapter shall be made after full hearing and upon a sworn complaint or any proceedings instituted of its own motion.

Sec. 823 requires the board to make written record of every invstigation and hearing and its proceedings.

Sec. 824 empowers the board to reverse or modify any order upon application after notice.

Sec. 825 empowers the board to investigate privileges afforded and burdens imposed upon vessels of the United States in foreign trade and report to th President of the United States.

Sec. 826 empowers the board to investigate alleged violations of this chapter, subpoena witnesses, compel the production of books, documents and other evidence, and compel testimony under oath.

Sec. 827 provides that no one shall be excused from testifying on the ground of self-incrimination, but grants immunity from criminal prosecution to natural persons so testifying.

Sec. 828 provides for the enforcement of any order of the board other than for the payment of money.

Sec. 829 provides for the enforcement of any order of the board for the payment of money in the District of the United States having jurisdiction, and that the findings and order of the board shall be prima facie evidence of the facts therein stated.

Sec. 830 provides that the venue and procedure in the courts of the United States in suits brought to enforce or revoke any order of the board shall be the same as in similar suits relating to the orders of the interstate commerce commission.

Sec. 831. The violation of this chapter is a misdemeanor punishable by fine not to exceed five thousand dollars.

Sec. 832. This chapter shall not be construed to affect the power or jurisdiction of the Interstate Commerce Commission.

Sec. 833 provides a separability clause in the event any one section of this chapter is held unconstitutional.

Sec. 834 empowers the Secretary of the Treasury to refuse clearance to a vessel where he finds such vessel declines to receive freight and has accommodation for the same.

Sec. 835 makes it unlawful to transfer any vessel owned by a citizen of the United States to a foreign registry.

Sec. 836 provides for proceedings upon forfeitures.

Sec. 837 provides in any forfeiture proceeding the conviction in any court of criminal jurisdiction shall be prima facie evidence in such proceedings.

Sec. 838 provides for the filing with the board of any mortgage or other transfer of any vessel.

Sec. 839 provides for the approval by the board of any act or transaction requiring such approval under this chapter.

Sec. 840 provides that any vessel registered, enrolled or licensed under the laws of the United States shall be a documented vessel within the meaning of Sec. 835.

Sec. 841 provides for the proclamation of the President that a war or emergency has ended.

Sec. 842 provides that the Act of September 7, 1916, c. 451, may be cited as "Shipping Act, 1916."

Hawaiian Organic Act

(36 Stat. c. 258; Title 48 U. S. C. Sec. 495)

"Sec. 5. That the Constitution, and, except as otherwise provided, all the laws of the United States, includ-

ing laws carrying general appropriations, which are not locally inapplicable, shall have the same force and effect within the said Territory of Hawaii as elsewhere in the United States."

* * * * * * *

"Sec. 55. That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable. * * * but the legislature shall not grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the approval of Congress; * * * *" (31 Stat. 150; 48 U. S. C. 562)

Washington Statute considered in *Great Northern Ry. Co. v. Washington,* 300 U. S. 154.

Remington's Revised Statutes

Sec. 10344. Definitions. "* * * The term 'common carrier,' when used in this act, includes all railroads, railroad companies, street railroads, street railroad companies, steamboat companies, express companies, car companies, sleeping car companies, freight companies, freight line companies, and every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, owning, operating, managing or controlling any such agency for public use in the conveyance of persons or property for hire within this state."

* * * * * * *

"The term 'public service company,' when used in this act, includes every common carrier, gas company, electrical company, water company, telephone company,

telegraph company, wharfinger and warehouseman as such terms are defined in this section."

Sec. 10417. Payment of fee. "That hereafter every person, firm or corporation engaged in business as a public utility and subject to regulation as to rates and charges by the department of public works, except auto transportation companies and steamboat companies holding certificates under sections 10361-1 and 10361-2, shall, on or before the first day of April of each year, file with the department of public works a statement on oath showing its gross operating revenue for the preceding calendar year or portion thereof and pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue: Provided, That the fee so paid shall in no case be less than ten dollars."

Sec. 10418. Disposition of fees. "All sums collected by the director of public works under the provisions of this act shall within thirty days after their receipt be paid to the state treasurer, and by him deposited in a fund to be known as the public service revolving fund."

Washington statutes after the decision in *Great Northern Ry. Co.* v. *Washington,* 300 U. S. 154.

Remington's Revised Statutes

Sec. 10417. "Every person, firm or corporation subject to regulation by the department of public service, * * * shall, * * * pay to the department a fee equivalent to 1/10 of one per cent of the first $50,000.00 of such gross operating revenue, plus 2/10 of one per cent of any such gross operating revenue in excess of $50,000.00: *Provided,* That the fee so paid shall in no case be less than one dollar. The percentage rates of gross operating revenue to be paid in any year as herein

provided may be decreased by the department for any or each class of persons, firms and corporations subject to the payment of such fees, by general order entered before March first of such year, and for such purpose such persons, firms and corporations shall be classified as follows: Electric companies, gas companies, water companies, telephone companies, telegraph companies, steam heating companies and irrigation companies shall constitute Class One; and railroad companies, electric railroad companies, express companies, sleeping car companies and toll bridge companies shall constitute Class Two. In fixing such rates each year the department shall take into consideration all monies then on hand in the public service revolving fund and all such fees currently to be paid into said fund, to the end that the fees so collected from the several classes of such companies shall be approximately the same as the reasonable cost of supervising and regulating such classes respectively."

Sec. 10417-3. "Every steamboat company operating under the provisions of chapter 248 of the Laws of 1927 and every wharfinger or warehouseman as defined by chapter 117 of the Session Laws of 1911, shall, on or before the first day of April of 1937 and of each year thereafter, file with the department a statement on oath showing its gross operating revenue from intrastate operations for the preceding calendar year or portion thereof and pay to the department a fee of 2/5 of one per cent of the amount of such gross operating revenue: *Provided,* That the fee so paid shall in no case be less than five dollars. The percentage rate of gross operating revenue to be paid in any year as herein provided may be decreased by the department by general order entered before March first of such year. In fixing such

rate the department shall take into consideration all monies on hand in the public service revolving fund and fees currently to be paid into said fund to the end that the fees so collected from steamboat companies and wharfingers or warehousemen as a group shall be approximately the same as the reasonable cost of supervising and regulating such companies as a group."